12.5 Standardization of Licensure

All Optometrists with a current license and no TPA or DPA certification and those with a DPA certification only, must meet the educational requirements to obtain their TPA certification by December 31, 2006.

ATTEST A TRUE COPY

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

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HINDS COUNTY, MISS. CHANCERY COURT

DR. HAROLD A. JEFCOAT; O.D.; DR. TED MALONE, O.D.; DR. DAVID M. FORD, O.D.; DR. JOHN T. JONES, O.D.; DR. R. EDWARD LEE, O.D.; DR. BARRY TEWIS, O.D.; AND DR. ALLEN D. FINLEY, O.D. — PLAINTIFFS

V. — CAUSE NO. G-2005-68 0/3

MISSISSIPPI STATE BOARD OF OPTOMETRY — DEFENDANT

ORDER AND OPINION OF THE COURT

THIS MATTER is before this Court on the Plaintiffs' Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment. Having heard testimony on the matter and all premises considered, the Court finds that the Motion is well taken and the relief requested shall be GRANTED. The Court further finds as follows:

Statement of Facts

Plaintiffs, Dr. Harold A. Jefcoat, O.D.; Dr. Ted Malone, O.D., Dr. David M. Ford, O.D.; Dr. John T. Jones, O.D.; Dr. Barry Tewis, O.D. and Dr. Allen D. Finley are optometrists who have been licensed to practice optometry in the state of Mississippi. The Mississippi State Board of Optometry ("Board") is an administrative body that regulates the profession of optometry pursuant to Miss. Code Ann. § 73-19-7. On December 12, 2003, the Board adopted Rule 12.5 which provides:

> Standardization of Licensure
> All Optometrist with a current license and no TPA or DPA certification and those with a DPA certification only, must meet the educational requirements to obtain their TPA certification by December 31, 2006.[1]

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[1]TPA means "therapeutic pharmaceutical agents" and DPA means "diagnostic pharmaceutical agents."

In a letter dated December 22, 2003, Plaintiffs sought clarification of the rule. On May 2, 2003, the Board sent a letter to Plaintiff's attorney stating its justification for the rule. The letter in pertinent part provides,

> Standardization of licensure has been a nation-wide trend in the profession of Optometry . . . The Medicare Program pays for Diabetic patients to have Glaucoma testing annually. The present multi-level certifications for Optometrists can result in patients receiving an eye exam from an Optometrist who could not treat their condition, causing the patient to seek treatment from a second Optometrist with therapeutic certification. Not only does this process cause delay in treatment, it also causes additional, unnecessary expense to the patient. Standardization of Licensure will provide better service to the public.
>
> The Board also expressed that considers Rule 12.5 to be reasonable, in that it does not preclude non-TPA certified optometrists from practicing after December 31, 2006:
>
> While a non-TPA certified optometrist will not have an active license to practice optometry independently and will not be able to sign prescriptions, he or she may continue to work under a therapeutically certified Optometrist.

On May 8, 2004, Plaintiffs' attorney appeared before the Board after being placed on the agenda for its Open Meeting. Plaintiffs filed a Petition Appealing the Final Administrative Decision on January 12, 2005 and an Amended Petition Appealing Final Administrative Decision on January 18, 2005. On February 17, 2005, the Board filed a Motion to Dismiss or in the Alternative for Summary Judgment and this Court entered an Order denying the Motion on June 20, 2005. The Board filed a Motion for Reconsideration and Other Relief and the Court granted the Board's Motion. The Plaintiffs filed their Amended Complaint for Declaratory Relief on November 9, 2005 and the Board filed its Answer and Affirmative Defenses on December 5, 2005. On March 1, 2006,

Plaintiffs filed their Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment. The Board filed its Response and Brief in Opposition to Motion for Judgment on the Pleadings on April 6, 2006. On April 17, 2006, Plaintiffs filed a Rebuttal Brief in Support of Motion for Judgment on the Pleadings or in the Alternative, Motion for Summary Judgment.

Legal Analysis

Rule 12 (c) of the Mississippi Rules of Civil Procedure provides that any party may move for judgment on the pleadings. A Rule 12 (c) motion for judgment on the pleadings is decided on the face of the pleadings alone. *Huff-Cook, Inc. v. Dale*, 913 So.2d 988, 990 (Miss. 2005).

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact. . . ." M.R.C.P. 56(c). The moving party has the burden of demonstrating that there is no genuine issue of material fact in existence, while the non-moving party should be given the benefit of every reasonable doubt. *Hinson v. N&W Constr. Co.*, 890 So. 2d 65, 66 (Miss. App. 2004). "If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied." *Id.* The moving party has the burden of demonstrating that there is no genuine issue of material fact in existence, while the non-moving party should be given the benefit of every reasonable doubt. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990). The party opposing the motion must be diligent and may not rest upon allegations or denials in the pleadings, but must by allegations or denials set forth specific facts showing that there are indeed issues for trial. *Richard v. Benchmark Const. Corp.*, 692 So.2d 60, 61 (Miss. 1997). Specifically, "when a motion for

> purpose of referring any deviation from the normal to a physician for treatment. The pharmaceutical agents so authorized shall be limited to the following classes: anesthetics, mydriatics, cycloplegics, dyes and over-the-counter drugs. Such agents shall be utilized in the practice of optometry only by the optometrist and shall not be dispensed to any patient. The limitations of this subsection shall not apply to those optometrists certified to use therapeutic pharmaceutical agents under the provisions of Sections 73-19-153 through 73-19-165.

While Plaintiffs agree that the Board has the authority to prescribe additional educational requirements, the Board asserts that Rule 12.5 as promulgated by the Board directly conflicts with Miss. Code Ann. § 73-19-155 (1) which reads,

> Within thirty (30) days after July 1, 1994, and annually thereafter, the State Board of Optometry with the advice and consultation of the designated members of the State Board of Medical Licensure and the State Board of Pharmacy, *shall develop rules and regulations requiring the satisfactory completion of the educational requirements, clinical training, and examinations required under the provisions of Sections 73-19-153 through 73-19-165, regarding those optometrists seeking to become certified to prescribe and use therapeutic pharmaceutical agents.* (Emphasis added).

The Board contends that Plaintiffs place the wrong interpretation on Miss. Code Ann. § 73-19-155 (1). The Board further asserts that the "word" seeking creates a temporal distinction, rather than requiring an act of discretion to trigger the requirements set forth in Section 73-19-155. "Great deference is afforded an administrative agency's construction of its own rules and regulations and statutes under which it operates." *Mississippi State Tax Commission v. Mask*, 667 So.2d 1313, 1314 (Miss. 1995). In *Titan Tire of Natchez, Inc. v. Mississippi Commission of Environmental Quality*, 891 So.2d 195, 200 (Miss. 2005) the Court stated:

> The scope of review of the findings and actions of an administrative agency is well established." *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So. 2d 1211, 1215 (Miss. 1993). "When an agency interprets a statute that it is responsible for administering, we must defer to the agency's interpretation so long as the interpretation is reasonable." *Parkerson*

summary judgment is filed, the non-moving party 'must rebut by producing significantly probative evidence showing that there are indeed genuine issues for trial." *Foster v. Neal*, 715 So.2d 174, 180 (Miss. 1998).

The Mississippi Legislature has the power to define, license and regulate the practice of optometry. *State Bd. of Optometry, ex rel. Reese v. Orkin*, 249 Miss. 430, 162 So.2d 883 (1964). Miss. Code Ann. § 73-19-9 provides in pertinent part, that "the board shall make such rules and regulations as may be necessary to carry out this chapter . . ."

Plaintiffs argue that Rule 12.5 exceeds the Board's rule-making authority. Rule 12.5 provides,

> Standardization of Licensure
> All Optometrist with a current license and no TPA or DPA certification and those with a DPA certification only, must meet the educational requirements to obtain their TPA certification by December 31, 2006.

Miss. Code Ann. § 73-19-101 provides that no one engaged in the practice of optometry may use pharmaceutical agents in practice without having been certified to use DPAs Sections 73-19-103 through 73-19-109 or certified to use TPAs under Sections 73-19-153 through 73-19-165. Miss. Code Ann. § 73-19-103(2) authorizes the Board to prescribe additional educational requirements of otherwise licensed optometrists:

> The State Board of Optometry, with the advice and consultation of the designated members of the State Board of Medical Licensure and the State Board of Pharmacy, shall prescribe additional educational requirements and additional theoretical and practical examinations for optometrists licensed to practice optometry in the State of Mississippi and applicants for a license to practice optometry in the State of Mississippi to become certified to use certain specified pharmaceutical agents as diagnostic agents only. The authorized use of such diagnostic pharmaceutical agents shall be specifically limited to those pharmaceutical agents which, when applied topically to the eye, are utilized in a prescribed manner to assess ocular conditions for the

> *v. Smith*, 817 So. 2d 529, 534 (Miss. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984)). Rather than applying its own interpretation when the applicable statute is silent or ambiguous regarding a specific question, the court determines whether the agency's interpretation was reasonable. *Chevron*, 467 U.S. at 843-44. "The reviewing court is concerned only with the reasonableness of the administrative order, not its correctness." *Miss. Dep't on Envtl. Quality v. Weems*, 653 So. 2d 266, 281 (Miss. 1995).
>
> Rather than reviewing an administrative agency decision de novo, this Court has set forth the following factors to be taken into account when determining whether a reviewing court should uphold an agency's order:
>
> > Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designed to hear the appeal. The appeal is a limited one... since the courts cannot enter the field of the administrative agency. The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party.

Although this Court acknowledges the authority granted to the Board by the legislature, this Court recognizes that pursuant to Mississippi law, an administrative agency cannot exceed the scope of that authority. "No proposition of law is better established than that administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of statute under which the agency proceeds." *Mississippi Milk Commission v. Winn-Dixie Louisiana, Inc.*, 235 So.2d 684, 688 (1970). The Court hereby finds that Rule 12.5 directly conflicts with Miss. Code Ann. § 73-19-155. The plain reading of Miss. Code Ann. § 73-19-155 makes it clear that rules and regulations promulgated by the Board regarding TPA educational requirements only applies to optometrists seeking to prescribe TPAs,

while Rule 12.5 requires TPA certification of all optometrists. This Court is convinced that the legislature has not authorized the Board to promulgate rules by which duly licensed optometrists may be precluded from practicing for not meeting any additional, non-statutory mandated educational requirements. This Court hereby finds that the statutes' plain reading indicates that the Board may implement rules relating to TPA certification for those optometrists who desire to prescribe TPAs. "Statutory provisions control with respect to the rules promulgated by such a body. Accordingly, such a body may not make rules and regulations which conflict, with, or are contrary to, the provisions of a statute, particularly the statute it is administering or which created it." *Mississippi Public Service Commission v. Mississippi Power & Light,* 593 So.2d 997, 1000 (Miss. 1991). The enactment of Rule 12.5 would require all duly licensed optometrists who are currently non-TPA certified to either obtain TPA certification or forfeit their licenses to practice optometry. If Rule 12.5 is to be implemented, Miss. Code Ann. § 73-19-155 must be repealed or the Mississippi Legislature must broaden the scope of the Board's authority in mandating such a rule.

Plaintiffs also assert that Rule 12.5 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it treats non-TPA certified optometrists, duly licensed to practice optometry in the State of Mississippi, differently than TPA certified optometrists and new applicants. Rule 12.5 states "All Optometrist with a current license and no TPA or DPA certification and those with a DPA certification only, must meet the educational requirements to obtain their TPA certification by December 31, 2006."

In order for the Court to determine whether this classification violates the Fourteenth Amendment, the Court must engage in the following two-part test. *Mississippi Board of Nursing v. Belk*, 481 So.2d 826, 830 (Miss. 1985). The first part of the test is to determine whether that

classification has been made of two groups of like or unlike persons. *Id.* The second part of the est is to determine whether the classification has a valid legislative purpose. *Id.* Both the due process clause and the equal protection clause forbid "class legislation arbitrarily discriminatory against some and favoring others in like circumstances." *Belk* at 830 citing 16A Am. Ju.2d *Constitutional Law* § 740 (1979).

1. Classification of Two Groups

In *Belk*, the Mississippi Board of Nursing adopted new rules with regard to the certification of nurse anesthetists. *Belk* at 828. The Board of Nursing also adopted a grandfather clause that allowed for certification of nurses who had practiced in the capacity of a nurse anesthetist prior to 1970 and who had practiced for a continuous period of fifteen years. However, to take advantage of this clause, the applicant had to notify the Board of Nursing by February 1, 1978, and submit to the Board of Nursing a protocol listing all medical acts and types of anesthesia being administered. *Id.* Belk argued that the grandfather clause was unconstitutional, in that it differed substantially from the grandfather clause for registered nurses or licensed practical nurses, which were both unlimited in time. The Court held that the grandfather clause for nurse anesthetists, in setting a time limit upon certification, denied the plaintiff the equal protection guaranteed by the Fourteenth Amendment.

In *City of Vicksburg v. Mullane*, a Vicksburg ordinance required that every applicant for a license as a plumber show that the applicant, or one resident member of the firm, or one relevant executive officer of the corporation making the application, was a master plumber. *City of Vicksburg v. Mullane*, 63 So. 412, 413 (Miss. 1913). If a plumber worked for a firm or corporation he did not have to comply with the requirements of examination and pay for his license, but a plumber who worked alone did have to bear the burden of examinations and the expense of a fee. *Id.* at 416. The

Mississippi Supreme Court reasoned:

> Government should protect [the appellant] in his sacred right to earn his livelihood by working at his trade. It should see that no unequal burdens are imposed upon him, and there is no discrimination against him because he labors alone. This ordinance does not operate equally upon Mr. Mullane and all other plumbers in the city. It is discriminatory to them. *Id.*

The Board contends that Rule 12.5 does not violate the Equal Protection Clause of the Fourteenth Amendment, but brings standardization to the optometry profession. The Board points to other states that have standardized the profession and held that if licensees refuse to obtain prescriptive authority, they cannot renew their license or automatically lose the privilege to practice optometry.

Although the Court recognizes the need to protect the ocular health of the general public, the Court feels that Rule 12.5 imposes a duty upon a certain class of optometrists – non-TPA certified optometrists to obtain TPA certification before December 31, 2006. If these non-certified TPA optometrists do not obtain TPA certification prior to December 31, 2006, they will be required to practice under a TPA-certified optometrist or will not be allowed to practice in the field of optometry. Like the nurses in Belk and the plumbers in Mullane, Plaintiffs are being unduly burdened by a rule that affects their ability to practice in their profession and earn a livelihood. This Court hereby finds that Rule 12.5 has classified like optometrists into two groups – TPA certified optometrists and Non-TPA certified optometrists, and such a classification violates the Equal Protection Clause of the Fourteenth Amendment.

2. *Classification for a Valid Legislative Purpose*

Plaintiffs argue that the Board deprived them of substantive due process because it imposed

license requirements that have no rational connection with the individual's fitness or capacity to practice in his profession. A state deprives an individual of substantive due process if the state imposes licensure requirements that have no rational connection with the individual's fitness or capacity to practice in his profession. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). Plaintiffs, who have been optometrists for at least twenty-eight years, argue that Rule 12.5 deprives them of their ability to continue to practice optometry and to earn a living in the profession in which they have been educated and trained, is an arbitrary deprivation of property by the Board.

The Board argues that standardization of the optometry profession serves a legitimate legislative purpose and bears a rational connection with an optometrist's fitness or capacity to practice in the profession.

In *Dent v. State of West Virginia*, the United States Supreme Court opined:

> **The power of the state to provide for the general welfare of its people authorize it to prescribe all such regulations as in its judgement will secure or tend to secure them against the consequences of ignorance and incapacity**, as well as of deception and fraud. A s one means to this end it has been the practice of different states from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent person, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. **The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty**. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application that they can operate to deprive one of his right to pursue a lawful vocation. *Dent v. State of West Virginia*, 129 U.S. 114,122; 9 S.Ct. 231, 32 L. Ed. 623 (1889).

This Court hereby finds that the Board's desire to standardize the profession serves a valid legislative purpose. Improving the ocular health of the people of the State of Mississippi serves a legitimate interest; however, the Court believes that the rules promulgated by the Board must not exceed its legislative authority or conflict with statutes that are currently in effect.

Based upon the foregoing reasons, the Court hereby finds that Rule 12.5 conflicts with Miss. Code Ann. § 73-19-155; accordingly, the Board lacked the authority to issue the mandate of Rule 12.5 and this Court finds that Rule 12.5 is invalid.

Conclusion

For the foregoing reasons, this Court hereby finds that Rule 12.5 as promulgated by the Mississippi Board of Optometry is invalid. Plaintiffs' Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment is hereby GRANTED.

SO ORDERED and ADJUDGED this the 10th day of August, 2006.

CHANCELLOR DENISE OWENS

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Beverly Limbaugh — Executive Director
Name — Title

Beverly Limbaugh
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